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RAJAMANI MEYAPPA CHETTIAR v. ENG BENG DEVELOPMENT SDN BHD & ORS

HIGH COURT MALAYA, SHAH ALAM
TEE GEOK HOCK J
[CIVIL SUIT NO: MT2-21-136-2007]
B 14 FEBRUARY 2023

Abstract – *In considering an application for a s. 33 certificate under the Government Proceedings Act 1956, factors and circumstances which are peculiar to the Government or which are relevant and applicable to the particular case at hand are to be decided according to the justice of the particular case. The court has to strike a balance between justice to the Government and justice to the private judgment-creditor. If a judgment creditor fails to produce cogent evidence that it would, inter alia, suffer undue hardship or grave injustice if the balance judgment sum is kept in abeyance and is not in urgent need of the use of the balance judgment sum over and above what it had already received from the Government, the discretion of the court ought not to be exercised to issue a s. 33 certificate.*

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CIVIL PROCEDURE: *Government proceedings – Satisfaction of orders – Certificate under s. 33(1) of Government Proceedings Act 1956 – Application for – Rationale behind s. 33(1) – Whether puts Government in worse position than private entity as judgment debtor – Whether s. 33(1) makes it mandatory for court to issue certificate irrespective of circumstances of case – Factors and criteria to be considered – Public interest and public funds – Whether discretion of court ought to be exercised to issue s. 33 certificate*

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The question of law in the present matter regarding a certificate under s. 33(1) of the Government Proceedings Act 1956 ('GPA') involved four-fold legal issues, namely: (i) what is the rationale behind s. 33(1) of the GPA; (ii) whether the said s. 33(1) puts the Government in a worse position than a private entity as judgment debtor; (iii) whether the said s. 33(1) makes it mandatory for the court to issue the s. 33(1) certificate irrespective of the circumstances of the case; and (iv) what are the factors and criteria to be considered when dealing with an application for the said s. 33(1) certificate. The subject matter here was the plaintiff judgment creditor's ('plaintiff') application for a certificate under s. 33(1) of the GPA to allow her to execute the balance of the judgment sum against the fifth defendant, the land administrator, and the sixth defendant, the Registrar of Titles, after they had already paid RM6,996,566.67 which constituted two-thirds of the total judgment sum this court ordered the fifth defendant, the sixth defendant and the seventh defendant, the advocate and solicitor to the plaintiff. The total judgment sum awarded by this court in the judgment dated 29 July 2021 after

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the assessment of damages pursuant to the Federal Court's judgment was comprised of (i) RM10,319,850 being the market value of the subject land (payable by the fifth, sixth and seventh defendants); (ii) RM85,000 as party to party costs of action (payable by fifth, sixth and seventh defendants); (iii) RM10,000 costs of assessment of damages (payable by fifth and sixth defendants); RM20,000 (payable by the seventh defendant). The fifth and sixth defendants respectively had already paid to the plaintiff RM6,996,566.67 which constituted about two-thirds of the total judgment sum, while there was no evidence that the plaintiff had received from the seventh defendant or had actively and diligently pursued execution of judgment or part thereof against the seventh defendant.

Held (dismissing application with liberty to file afresh):

(1) The Malaysian GPA is modelled on the UK Crown Proceedings Act 1947 ('CPA'). The CPA is an Act of the Parliament of the United Kingdom that allowed, for the first time, civil actions against the Crown to be brought in the same way as against any other party. The CPA also reasserted the common law doctrine of Crown privilege but by making it, for the first time, justiciable paved the way for the development of the modern law of public interest immunity. Even after the passing of the CPA, there remained significant differences between Crown proceedings and claims between private parties, especially as to enforcement of judgments. Section 33 of the GPA is in *pari materia* with s. 25 of the UK CPA. (paras 11 & 12)

(2) None of the ordinary rules about enforcement applies in respect of any order against the Government (or the Crown in UK). A special procedure is prescribed for the enforcement of such orders, namely, in s. 33 of the Malaysian GPA and its equivalent s. 25 of the UK CPA. Apart from what had been stated in s. 33 of the GPA (or s. 25 of the UK CPA), no execution or attachment or process in the nature thereof could be issued against the Government/Crown and no person is individually liable under any order for payment by the Government/Crown or any officer of the Government/Crown as such. Similarly, the procedures for attachment of debts or appointment of a receiver are not available for debts due from the Government/Crown. From the context, express provisions and legislative history of the GPA, it was reasonably clear that the GPA still placed the Government in a special or relatively more privileged position as compared with a private person and that s. 33(1) of the GPA does not, in any way, puts the Government in a worse position than a private entity as judgment debtor. (paras 15 & 21)

(3) The effect of the Federal Court decision in *Minister Of Finance, Government Of Sabah v. Petrojasa Sdn Bhd* was that (i) under s. 33(1), the court has a discretion whether or not to issue a certificate and the terms of the certificate; and (ii) when a s. 33(1) certificate has been issued, s. 33(3) renders it mandatory or obligatory for the Government to satisfy the judgment in accordance with the court's certificate. The existence of the court's discretion in considering whether or not to issue a s. 33 certificate was also consistent with the context, legislative history and other provisions of GPA. In the premises, s. 33(1) does not make it mandatory for the court to issue the s. 33(1) certificate irrespective of the circumstances of the case. (paras 23, 25 & 26)

(4) On the specific topic of stay of execution and/or suspension of execution of judgment against the Government, there are two express provisions in the GPA, namely, s. 33 and s. 30. In the premises, the proviso to s. 33(3) of GPA is not equated to or limited by stay of execution pending appeal under s. 30 of the GPA. The effect of the proviso to s. 33(3) read in the context of the Act including s. 30 is that, in considering an application for a s. 33 certificate, the factors and criteria which the court may take into account are (i) the factors and circumstances which apply to execution pending appeal in proceedings between private subjects; and (ii) other factors and circumstances which are peculiar to the Government or which are relevant and applicable to the particular case at hand. As the proviso to s. 33(3) of the GPA does not lay down express fetters to the discretion, the other factors and circumstances which are peculiar to the Government or which are relevant and applicable to the particular case at hand are fact-sensitive matters to be decided according to the justice of the particular case. In considering whether or not to exercise the discretion and if so, how to exercise it, the court is to strike a balance between justice to the Government and justice to the private judgment creditor in the circumstances of the case at hand. (paras 38, 41, 43 & 45)

(5) The plaintiff had not produced any cogent evidence that she was in urgent need of the use of the balance judgment sum over and above RM6,996,566.67 she had already received from the fifth and sixth defendants. The plaintiff had also not produced any cogent evidence that she would suffer undue hardship or grave injustice if the balance judgment sum was kept in abeyance until further decision or clarification of the Federal Court on two questions posed by this court. Moreover, the plaintiff was a foreign national but she had not produced any evidence that she had substantial assets or property within Malaysia which the State Government can have ready recourse to in the event of any over-payment by the State Government on behalf of the fifth and sixth defendants. In the circumstances, the State Government on behalf

of the fifth and sixth defendants had already paid about two-thirds of the total judgment sum, an amount which was more than what this court envisaged. (paras 67-69)

(6) If the Federal Court were to apportion the responsibility and/or liability as between the fifth and sixth defendant on the one part and the seventh defendant on the other part, the fifth and sixth defendants' portion of liability and responsibility was unlikely to exceed half. The High Court, the Court of Appeal and the Federal Court held that the seventh defendant had actively participated in the fraud of the second defendant and the scheme of the fraudster. The seventh defendant's active participation in the fraud of the fraudster would logically carry a comparatively heavier responsibility and more percentage liability than that of the fifth and sixth defendants' negligence. In addition, this court also took into consideration that the funds of the State Government which were used to pay the judgment sum to the plaintiff were public funds which were to be used for public interest or public purposes. It did not serve the public interest for the public funds to be ordered to be paid out for the balance judgment sum in the peculiar circumstances of this case until the Federal Court had clarified and/or made ancillary orders on the questions raised in this court's grounds of judgments on the assessment of damages. (paras 70 & 71)

(7) Therefore, the discretion of the court ought not to be exercised to issue a s. 33 certificate in favour of the plaintiff against the fifth and sixth defendants (public officers) after the State Government had already paid the plaintiff about two-thirds of the total damages assessed and awarded by this court. (para 72)

Case(s) referred to:

A-G v. Prince Ernest Augustus [1957] AC 636 ***(refd)***

Cheong Wai Kwan & Anor v. Pentadbir Tanah Petaling & Anor; Pentadbir Hakmilik Tanah Negeri Selangor & Anor (Third Parties) [2021] 4 CLJ 422 HC ***(refd)***

Dr HK Fong Brainbuilder Pte Ltd v. SG-Maths Sdn Bhd & Ors [2021] 1 CLJ 155 CA ***(refd)***

Dr Lee Chong Meng v. Returning Officer (Abdul Rahman Abdullah) & Ors (No 1) [2000] 3 CLJ 519 HC ***(refd)***

Evans v. Bartlam [1937] AC 473 ***(refd)***

Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors [1985] 1 CLJ 511; [1985] CLJ (Rep) 122 SC ***(refd)***

Global Upline Sdn Bhd v. Kerajaan Malaysia [2015] 6 CLJ 497 HC ***(refd)***

Harris v. DPP [1952] 1 All ER 1050 ***(refd)***

Lai Soon Onn v. Chew Fei Meng & Other Appeals [2018] 10 CLJ 48 CA ***(refd)***

Lee Lee Cheng v. Seow Peng Kwang [1960] MLJ 1 ***(refd)***

Menteri Besar Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd [2010] 5 CLJ 123 CA ***(refd)***

Minister Of Finance, Government Of Sabah v. Petrojasa Sdn Bhd [2008] 5 CLJ 321 FC ***(refd)***

Muholland v. Mitchell [1971] AC 666 ***(refd)***
Mutual Life & Citizens' Assurance Company Ltd & Another v. Clive Raleigh Evatt [1971] AC 793 ***(refd)***
Powell v. Kempton Park Race Course Co [1899] AC 143 ***(refd)***
PP v. Lee Tin Bau [1984] 1 LNS 56 ***(refd)***
Pushpaleela R Selvararajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals [2019] 3 CLJ 441 FC ***(refd)***
Quinn v. Leatham [1901] AC 495 ***(refd)***
Rainbow Bay Sdn Bhd v. MLGH (Sabah) Sdn Bhd & Anor [2020] 1 LNS 2308 HC ***(refd)***
Rajamani Meyappa Chettiar v. Eng Beng Development Sdn Bhd & Ors [2021] 1 LNS 2233 HC ***(refd)***
Reg v. Schildkamp [1971] AC 1 ***(refd)***
Rex v. Bishop of Oxford [1879] 4 QBD 245 ***(refd)***
Tang Hak Ju v. Ketua Menteri Negeri Pulau Pinang & Ors [2010] 1 CLJ 993 CA ***(refd)***
Tenaga Nasional Bhd v. Evergrowth Aquaculture Sdn Bhd & Other Appeals [2021] 9 CLJ 179 FC ***(refd)***

Legislation referred to:
Government Proceedings Act 1956, ss. 4, 5, 7, 10, 14(1), 15, 30, 33(1), (3), 34

Crown Proceedings Act 1947 [UK], s. 25

Other source(s) referred to:
Halsbury's Laws of England, 2009, 5th edn, vol 12, p 138, para 1239
Halsbury's Laws of England, 2014, 5th edn, vol 29, p 70, para 111
Halsbury's Laws of Malaysia, 2014 Reissue, vol 7(2), p 1201, para 190.13.012

For the plaintiff - Sudharsanan Thillainathan & Tania Kat-Lin Edward; M/s Steven Thiru & Sudhar Partnership
For the 5th & 6th defendants - Mohd Abdul Hakim Mohd Ali; State Legal Advisor, Selangor
For the 7th defendant - Puung Kok Peing, Steven & Satish Vasudevan Nair; M/s Satish Ali & Assocs

Reported by Suhainah Wahiduddin

JUDGMENT

Tee Geok Hock J:

Introduction

[1] The question of law, which seems to be a novel question in the present matter regarding certificate under s. 33(1) of the Government Proceedings Act 1956 involves four-fold legal issues, namely:

(i) what is the rationale behind s. 33(1) of the Government Proceedings Act 1956;

(ii) whether the said s. 33(1) puts the Government in worse position than a private entity as judgment debtor;

(iii) whether the said s. 33(1) makes it mandatory for the court to issue the s. 33(1) certificate irrespective of the circumstances of the case; and

(iv) if the answer to issue (iii) is in the negative, what are the factors and criteria to be considered when dealing with an application for the said s. 33(1) certificate.

[2] On 8 December 2022, this court was of the view that both issues (ii) and (iii) should be answered in the negative and after having considered the entire circumstances of the matter, this court dismissed the judgment creditor's application for the said s. 33(1) certificate with liberty to file afresh, if expedient, after the Federal Court's clarification and/or decision on two miscellaneous question which arose out of the Federal Court's order for assessment of damages.

[3] The subject matter here is the plaintiff judgment creditor's application for a certificate under s. 33(1) of the Government Proceedings Act 1956 to allow her to execute the balance of the judgment sum against the fifth defendant (Pentadbir Tanah Daerah Klang or the Land Administrator of Klang District) and the sixth defendant (Pendaftar Hakmilik Negeri Selangor Darul Ehsan or the Selangor Registrar of Titles) after they have already been paid RM6,996,566.67 which constitutes about two-thirds of the total judgment sum this court ordered the fifth defendant (Land Administrator), the sixth defendant (Registrar of Titles) and the seventh defendant (Sheelan Arjunan, advocate and solicitor) to the plaintiff judgment creditor.

[4] The total judgment sum awarded by this court in the judgment dated 29 July 2021 after the assessment of damages pursuant to the Federal Court's judgment is comprised of (i) RM10,319,850 being the market value of the subject land (payable by fifth, sixth and seventh defendants); (ii) RM85,000 as party-to-party costs of action (payable by fifth, sixth and seventh defendants); (iii) RM10,000 costs of assessment of damages (payable by fifth and sixth defendants); RM20,000 (payable by the seventh defendant).

[5] The fifth and sixth defendants (respectively the Land Administrator and the Registrar of Titles) have already paid to the plaintiff RM6,996,566.67 which constitutes about two-thirds of the total judgment sum, while there is no evidence that the plaintiff has received from the seventh defendant (advocate and solicitor) or has actively and diligently pursued execution of judgment or part thereof against the seventh defendant (advocate and solicitor).

[6] In the present matter, it is undisputed that the Government Proceedings Act 1956 applies to the fifth and sixth defendants, being public officers employed by the State Government of Selangor.

A **Background Events**

[7] The judgment which the plaintiff herein sought to obtain s. 33 certificate under the Government Proceedings Act 1956 for leave to enforce the balance judgment against the State governmental bodies is a judgment dated 29 July 2021 resulting from this court's assessment of damages.

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[8] This court's said assessment of damages was carried out in pursuance of and in implementation of the judgments and orders of the Federal Court in the consolidated appeals which originated from one High Court suit.

[9] The original High Court suit is Shah Alam High Court Writ of C Summons No. MT2-21-136-2007, and the appeal therefrom was registered as Court of Appeal Civil Appeal No. B-01(W)-71-03-2015. On further appeals to the Federal Court, the Federal Court's judgments are in Federal Court Civil Appeals No. 01(F)-32-10-2016 ('FCCA No. 32'), No. 01(F)-33-10-2016 ('FCCA No. 33') and No. 01(F)-34-10-2016 ('FCCA No. 34') D reported in *Pushpaleela R Selvararajah & Anor v. Rajamani Meyappa Chettiar & Other Appeals* [2019] 3 CLJ 441; [2019] 2 MLJ 553. In the judgment of the Federal Court, FCCA No. 32 (appeal by the third and fourth defendants Pushpaleela and Messrs MY Choong Pushpa & Co) is also referred to as "the first appeal", FCCA No. 33 (appeal by the first defendant Eng Beng Development) as "the second appeal" and FCCA No. 34 (appeal by the E seventh defendant Sheelan Arjunan) as "the third appeal": see paras. [5], [6] and [7] of the Federal Court's grounds of judgment.

Provisions Of Section 33 Of The Government Proceedings Act 1956

[10] Section 33 of the Government Proceedings Act 1956 provides as F follows:

> 33(1) Where in any civil proceedings by or against the Government or in any proceedings under Chapter VIII of the Specific Relief Act 1950, or in any such proceedings as would in England be brought on the Crown side of the Queen's Bench Division, or in connection with any arbitration to G which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and H the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:
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> > Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the I applicant.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the person for the time being named in the record as the advocate for the Government or for the Government department or officer concerned.

(3) If *the order* provides for the payment of any money by way of damages or otherwise, or of any costs, *the certificate shall state the amount so payable, and the appropriate Government shall, subject as hereinafter provided, pay to the person entitled or to his solicitor the amount appearing by the certificate to be due to him* together with the interest, if any, lawfully due thereon:

Provided that *the court by which any such order as aforesaid is made* or any court to which an appeal against the order lies *may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such directions to be inserted therein.*

(4) *Save as aforesaid no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any such money or costs as aforesaid,* and no person shall be individually liable under any order for the payment by the Government or any officer of the Government as such, of any such money or costs. (emphasis added)

Rationale Of Section 33 Of The Government Proceedings Act 1956

[11] The Malaysian Government Proceedings Act 1956 is modelled on the UK Crown Proceedings Act 1947.

[12] The Crown Proceedings Act 1947 is an Act of the Parliament of the United Kingdom that allowed, for the first time, civil actions against the Crown to be brought in the same way as against any other party. The Act also reasserted the common law doctrine of Crown privilege but by making it, for the first time, justiciable paved the way for the development of the modern law of public interest immunity. The Act received royal assent on 31 July 1947 and came into force on 1 January 1948. Even after the passing of the 1947 Act, there remain significant differences between Crown proceedings and claims between private parties, especially as to enforcement of judgments. These differences are expressly provided for or preserved in the 1947 Act.

[13] Section 33 of the Malaysian Government Proceedings Act 1956 is in *pari materia* with the s. 25 of UK Crown Proceedings Act 1947 which s. 25 provides as follows:

25. Satisfaction of orders against the Crown.

(1) Where in any civil proceedings by or against the Crown, or in any proceedings on the Crown side of the King's Bench Division, or in connection with any arbitration to which the Crown is a party, any order (including an order for costs) is made by any court in favour of any person against the Crown or against a Government department or against an officer of the Crown as such, the proper officer of the court shall, on an

application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:

Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the person for the time being named in the record as the solicitor, or as the person acting as solicitor, for the Crown or for the Government department or officer concerned.

(3) If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the appropriate Government department shall, subject as hereinafter provided, pay to the person entitled or to his solicitor the amount appearing by the certificate to be due to him together with the interest, if any, lawfully due thereon:

Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such directions to be inserted therein.

(4) Save as aforesaid no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Crown of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Crown, or any Government department, or any officer of the Crown as such, of any such money or costs.

[14] *Halsbury's Laws of England* explains the background of the UK Crown Proceedings Act 1947 in these words:

84. **Position at common law.** Under the general rule at common law no proceeding, civil or criminal, was maintainable against the monarch in person, for, it was said, the courts, being the King's own, could have no jurisdiction over him. Before the passing of the Crown Proceedings Act 1947, the only methods by which redress might be sought against the Crown in the courts were by way of petition of right, which was dependent on the grant of the royal fiat; by suits against the Attorney General for a declaration; or by actions against ministers and government departments which had been incorporated or declared liable to suit by statute. The Crown enjoyed numerous immunities and privileges, in particular immunity from liability for damages for torts committed by

Crown servants. Similarly, there were available to the Crown special methods of enforcing its own claims in the courts, and proceedings by the Crown followed special forms of procedure.

85. **The Crown Proceedings Act 1947.** The Crown Proceedings Act 1947 substantially altered both the procedure to be followed in civil proceedings by and against the Crown and the substantive law governing the rights and liabilities of the Crown. Subject to certain exceptions, the Act abolished the special forms of procedure which previously governed civil proceedings by and against the Crown. As a result, these proceedings are, subject to certain special provisions, governed by the same rules as proceedings between subjects. Similarly, subject to certain exceptions, the Act enables civil proceedings to be taken against the Crown in the same circumstances as they can be taken against a subject.

93. **Liability of the Crown.** Prior to 1947 grievances against the Crown were brought by way of a petition of right, and the Crown's prerogative immunity meant that the consent of the Crown itself, acting on the advice of the Attorney General, was required to legal proceedings being brought, which it forthcoming was granted by way of an endorsement of the words *fiat justitia* (let right be done on the claim. However the Crown Proceedings Act 1947 removed these previous impediments, and today the Crown may be sued in contact or tort in similar in the normal manner as a private person. Legal proceedings may now be brought against a government department, or if none is appropriate, the Attorney General.

(see *Halsbury's Laws of England*, 5th edn, 2014 (Lexis Nexis), vol. 29 paras. 85, 86 and 93 at pp. 49 and 55)

Whether The Said Section 33(1) Puts The Government In Worse Position Than A Private Entity As Judgment Debtor

[15] Commentaries have consistently stated the effect of s. 33 of the Malaysian Government Proceedings Act 1956 and its equivalent s. 25 of the UK Crown Proceedings Act 1947 as follows:

(i) none of the ordinary rules about enforcement applies in respect of any order against the Government (or the Crown in UK). A special procedure is prescribed for the enforcement of such orders, namely in s. 33 of the Malaysian Government Proceedings Act 1956 and its equivalent s. 25 of the UK Crown Proceedings Act 1947; and

(ii) apart from what has been stated in s. 33 of the Government Proceedings Act 1956 (or s. 25 of the UK Crown Proceedings Act 1947), no execution or attachment or process in the nature thereof can be issued against the Government/Crown, and no person is individually liable under any order for payment by the Government/Crown or any officer of the Government/Crown as such. Similarly, the procedures for attachment of debts or appointment of a receiver are not available for debts due from the Government/Crown.

(see *Halsbury's Laws of Malaysia*, 2014 Reissue, vol. 7(2) para. 190.13.012 at p. 1201; *Halsbury's Laws of England*, 5th edn 2009 (Lexis Nexis), vol. 12 para.1239 at p. 138; *Halsbury's Laws of England*, 5th edn, 2014 (Lexis Nexis), vol. 29 para. 111 at p. 70).

These commentaries have correctly summarised the general effect of s. 33 of the Act.

[16] Prior to the UK Crown Proceedings Act 1947, proceedings against the Crown were brought by petition of right which was backed by a *fiat justitia* issued by consent of the Crown acting on the advice of the Attorney General, by suits against the Attorney General for a declaration, or by actions against Ministers and Government departments which had been incorporated or declared liable to suit by statute. Under the common law prior to the UK Crown Proceedings Act 1947, suits in respect of tort would be by way of petition of right. The UK Crown Proceedings Act 1947 removed such impediments by enacting the specific types of proceedings which the citizens can bring against the Crown as executive.

[17] Despite the removal of the major impediments under the common law requirement of petition of right, the UK Crown Proceedings Act 1947 still recognises the special positions of the Crown in civil proceedings and also provides for preservation of exemptions from Crown liability in certain types of cases and imposes limitations to Crown liability in some specific types of proceedings. The Malaysian Government Proceedings Act 1956 ('GPA 1956'), which is modelled on the UK Crown Proceedings Act 1947, also contains similar preservation of the Government's special position in respect of such exemptions and limitations.

[18] Examples of preservation of the Government/Crown's special position in respect of such exemptions and limitations include those summarised below:

(i) section 4 of the GPA 1956 allows a subject to sue the Government in respect of the following general types of causes of action, namely in respect of land, revenue law, contract, and/or a non-tortious claim for damages or compensation to the same extent as between the subjects and in accordance with GPA 1956;

(ii) section 5 of the GPA 1956 allows a subject to sue the Government in torts for wrongful act or neglect or default of any public officer in the same manner and to the same extent as in which a principal, being a private person, is so liable and in accordance with GPA 1956;

(iii) section 7 "savings of acts done in exercise of public duties", exempts the Government from being sued for exercise of public duties in the construction or maintenance of public buildings, facilities and infrastructure works except for breach of contract or suit for damages or compensation arising out of negligence or trespass in the execution of such works.

(iv) section 10 of the GPA 1956 recognises the priority of Government debts over private debts of similar ranking in priority;

(v) section 14(1) of the GPA 1956 exempts the members of the forces and the Government from liability in tort for causing the death or personal injury to another person in so far as the death or personal injury is due to anything suffered by that other person while he is a member of the forces;

(vi) section 15 of the GPA 1956 provides for saving in respect of acts done under prerogative and statutory powers.

[19] Section 33 provides for satisfaction of orders against the Government.

[20] Section 34 provides that when the Government obtains any order in its favour, the order in favour of the Government against any person may be enforced in the same manner as an order made in an action between subjects and not otherwise.

[21] From the context, express provisions and legislative history of GPA 1956, it is reasonably clear that the GPA 1956 still places the Government in a special or relatively more privileged position as compared with a private person and that s. 33(1) of the GPA 1956 does not in any way put the Government in a worse position than a private entity as judgment debtor.

Whether The Said Section 33(1) Makes It Mandatory For The Court To Issue The Section 33(1) Certificate Irrespective Of The Circumstances Of The Case

[22] In the Federal Court decision of *Minister Of Finance, Government Of Sabah v. Petrojasa Sdn Bhd* [2008] 5 CLJ 321; [2008] 4 MLJ 641, Ariffin Zakaria FCJ (later CJ) held as follows:

> [67] I will now consider the merit of this application. The respondent contends that s. 33(3) of the GPA on its proper construction creates a statutory duty on the part of the appellant to pay the respondent the amount appearing on the certificate to be due to it together with the interest due thereon. This duty the learned counsel for the respondent contends arose from the use of the mandatory word "shall" in the said subsection. The appellant on the other hand contends that the word "shall" here is merely directory in effect and not mandatory. *I agree that the word "shall" in a statute such as this may carry one of the two meanings as contended. Its true meaning may be obtained by considering the context in which it is used. Here the certificate is issued pursuant to sub-s. (1) of s. 33 in the circumstances where an order was made by any court in favour of any person against the Government or against any officer of the Government. The certificate really is an alternative mode of enforcement of judgment against the Government. Like in the instant case judgment had been obtained against the State Government as early as 1 April 2002 and a certificate under s. 33(3) of the GPA was issued on 20 May 2004. Therefore, the certificate is premised on the judgment of court of law, which*

is binding on the State Government. In that context it cannot be seriously argued that the word "shall" is merely directory and not mandatory in effect. H.W.R. Wade & C.F. Forsyth in *Administrative Law*, 7th edn at p. 836 stated:

> The Act (referring to the Crown Proceedings Act 1947) also exempts the Crown from the compulsory machinery of law enforcement. This is not in order to enable the Crown to flout the law, but because it would be unseemly if, for example, a sheriff's execution could be issued against a government department which failed to satisfy a judgment. For the purposes of the Act the Crown must be treated as an honest man, and the ordinary laws must have their teeth drawn. Therefore the Act provides that no execution or attachment or process shall issue for enforcing payment by the Crown.

[68] Thus it must be brought to bear on the State Government that the GPA is not there to enable the Government to flout the law, it merely provides a special procedure in order to avoid the embarrassment of execution proceeding being taken against the State Government. I think it is reasonable to expect the State Government to act with honour and responsibility and the appellant in the present case is no exception. I do not wish to go into the issue why the State Government had acted the way they did in the present case. It is never in dispute that the respondent is in law entitled to the judgment as specified in the certificate. *Therefore, I agree with the respondent that in the context of s. 33(3) of the GPA the word "shall" connotes an obligation to pay.* The fact that in s. 33(3) of the GPA it is provided that 'pending an appeal or otherwise' the Government may apply for a stay or suspension of the payment, would go to further strengthen the respondent's contention. *Had the duty to pay not being mandatory in nature there is no necessity for the Government to apply for a stay or suspension of payment. For the above reasons I am satisfied that in the context of s. 33(3) of the GPA the word "shall" obtaining therein is obligatory in effect.*

[69] On that premise I am of the view *that once a certificate is issued under s. 33(1) of the GPA and duly served on the State Government it is then obligatory on the State Government to make the necessary payment. In other words s. 33(3) of the GPA creates a statutory duty on the part of the State Government to pay the amount as certified.* The next question is whether an order of *mandamus* may be issued against the Minister of Finance, Government of Sabah, the appellant in the present case directing the appellant to pay the sum as stated in the certificate.

(emphasis added)

[23] The effect of the Federal Court's decision in *Minister Of Finance, Government Of Sabah v. Petrojasa Sdn Bhd* is that:

(i) under s. 33(1), the court has a discretion whether or not to issue a certificate and the terms of the certificate; and

(ii) when a s. 33(1) certificate has been issued, s. 33(3) renders it mandatory or obligatory for the Government to satisfy the judgment in accordance with the court's certificate.

[24] This court respectfully accepts the Federal Court's *dictum* as the correct law on s. 33(1) and s. 33(3) of the Government Proceedings Act 1956.

[25] The existence of the court's discretion in considering whether or not to issue a s. 33 certificate is also consistent with the context, legislative history and other provisions of GPA 1956 and is reinforced by the express words in the proviso to s. 33(3) which provides as follows:

> Provided that *the court by which any such order as aforesaid is made* or any court to which an appeal against the order lies *may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such directions to be inserted therein.* (emphasis added)

[26] In the premises, this court holds that the said s. 33(1) does not make it mandatory for the court to issue the s. 33(1) certificate irrespective of the circumstances of the case.

Factors And Criteria To Be Considered When Dealing With An Application For The Said Section 33(1) Certificate

[27] This court has not been able to find any reported judgment of our appellate court on the specific question whether or not the suspension of enforcement referred to in the proviso to s. 33(3) of the GPA 1956 is only to be directed under the same circumstances and in the same manner or extent as the stay of execution pending appeal as between private persons. From the research carried out in the course of this case, there are two reported decisions of the High Court which seem to suggest or hint that the suspension of enforcement referred to in the proviso to s. 33(3) of the GPA 1956 can be directed under a relatively wider circumstances than the stay of execution pending appeal as between private persons, while there is one decision of the High Court which seems to suggest or hint that it is so limited. The first reported decision which equated the suspension direction under the proviso to s. 33(3) with stay of execution pending appeal between private persons is *Cheong Wai Kwan & Anor v. Pentadbir Tanah Petaling & Anor* [2021] 4 CLJ 422, and the two decisions which suggest a relatively wider range of circumstances for directing a suspension under the proviso to s. 33(3) of the GPA 1956 are *Global Upline Sdn Bhd v. Kerajaan Malaysia* [2015] 6 CLJ 497 and *Rainbow Bay Sdn Bhd v. MLGH (Sabah) Sdn Bhd & Anor* [2020] 1 LNS 2308.

[28] The Federal Court's decision in *Minister Of Finance, Government Of Sabah v. Petrojasa Sdn Bhd* (*supra*) and the Court of Appeal's decisions in *Tang Hak Ju v. Ketua Menteri Negeri Pulau Pinang & Ors* [2010] 1 CLJ 993 (judgment written by KN Segara JCA) and *Menteri Besar Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd* [2010] 5 CLJ 123 (judgment written by Jeffrey Tan JCA (later FCJ)) were cases which dealt with a factual situation when the s. 33(1) certificate had already been issued, and it did not deal with the factors and criteria to be considered when hearing an application for the said s. 33(1) certificate.

[29] In the face of the conflicting decisions of the High Court, it is appropriate that the relevant express provisions of the GPA 1956 be interpreted in accordance with the settled principles of statutory interpretation so as to analyse which of the decisions should be preferred.

[30] The main principles on statutory interpretation have been summarised by the recent Federal Court decision in *Tenaga Nasional Bhd v. Evergrowth Aquaculture Sdn Bhd & Other Appeals* [2021] 9 CLJ 179 which approved and followed Vernon Ong FCJ's judgment in another recent case:

> [13] But before dealing with these key considerations, it is important to reiterate the latest decision of this court in *Tebin Mostapa v. Hulba-Danyal Balia & Anor* [2020] 7 CLJ 561; [2020] 4 MLJ 721 at 735; FC ("*Tebin*") in relation to the principles of statutory interpretation. In *Tebin* (*supra*) this court had the occasion to decide on the interpretation of the provisions relating on whether *qua* administrator had the *locus standi* to apply for the removal of the caveat under sub-s. 177(1) of the Sarawak Land Code. Vernon FCJ succinctly summarised as follows at 581 (CLJ); 734-741 (MLJ):
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> > [30] In our opinion, the rules governing statutory interpretation may be summarised as follows. First, in construing a statute effect must be given to the object and intent of the Legislature in enacting the statute. Accordingly, *the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself. Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute. Second, if, however the words employed are not clear, then the court may adopt the purposive approach* in construing the meaning of the words used. Section 17A of the Interpretation Acts 1948 and 1967 provides for a purposive approach in the interpretation of statutes. Therefore, *where the words of a statute are unambiguous, plain and clear, they must be given their natural and ordinary meaning. The statute should be construed as a whole and the words used in a section must be given their plain grammatical meaning. It is not the province of the court to add or subtract any word;* the duty of the court is limited to interpreting the words used by the legislature and it has no power to fill in the gaps disclosed. Even

> if the words in a statute may be ambiguous, the power and duty of the court 'to travel outside them on a voyage of discovery are strictly limited'. *Third, the relevant provisions of an enactment must be read in accordance with the legislative purpose and applies especially where the literal meaning is clear and reflects the purposes of the enactment. This is done by reference to the words used in the provision; where it becomes necessary to consider every word in each section and give its widest significance.* An interpretation which would advance the object and purpose of the enactment must be the prime consideration of the court, so as to give full meaning and effect to it in the achievement to the declared objective. As such, in taking a purposive approach, the court is prepared to look at much extraneous materials that bears on the background against which the legislation was enacted. It follows that a statute has to be read in the correct context and that as such the court is permitted to read additional words into a statutory provision where clear reasons for doing so are to be found in the statute itself. (emphasis added)

[31] The abovementioned statement of principle has endorsed the following *dictum* of Cockburn CJ which was reported more than a century ago:

"A statute ought to be so construed that, if it can be prevented, no clause sentence, or words shall be superfluous, void or insignificant": per Cockburn CJ in *Rex v. Bishop of Oxford* [1879] 4 QBD 245; 5 App Cas 214 (House of Lords).

[32] To the same effect was the statement of principle by Eusoffe Abdoolcader SCJ that all words in a statute are to be considered in the interpretation of a statute. On presumption that the Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute it was put there, for a purpose: see Eusoffe Abdoolcader SCJ's judgment in the Supreme Court case of *Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors* [1985] 1 CLJ 511; [1985] CLJ (Rep) 122; [1985] 2 MLJ 35 wherein His Lordship held at pp. 125-126 (CLJ); p. 43 (MLJ):

> Now if sections 5 and 6 are indeed intended to be read conjunctively, quite apart from the fact that there would be no reason why they could not have been enacted together as a composite section, section 6(2) would be wholly unnecessary and redundant. The court however is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded. In *Quebec Railway, Light, Heat and Power Co Ltd v. Vandry* [1920] AC 662, Lord Sumner in delivering the judgment of the Judicial Committee said (at p. 676):

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> Secondly, there is no reason why the usual rule should not apply to this as to other statutes – namely, that effect must be given, if possible, to all the words used for the legislature is deemed not to waste its words or to say anything in vain.

The Judicial Committee applied and followed this case in *Enmore Estates Ltd v. Darson* [1970] AC 497 506 (at page 506).

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[33] There are also many other decisions of the Federal Court which applied the harmonious construction of the various provisions in the statutes.

[34] Where different words are used in a statute, they refer to different things; this is particularly so when the different words are used repeatedly: per Thomas CJ in *Lee Lee Cheng v. Seow Peng Kwang* [1960] MLJ 1 at p. 3 (Court of Appeal). This is echoed by the judgments of our Court of Appeal in *Lai Soon Onn v. Chew Fei Meng & Other Appeals* [2018] 10 CLJ 48 at 66, *Dr Lee Chong Meng v. Returning Officer (Abdul Rahman Abdullah) & Ors (No. 1)* [2000] 3 CLJ 519 at 527 and in *Dr HK Fong Brainbuilder Pte Ltd v. SG-Maths Sdn Bhd & Ors* [2021] 1 CLJ 155; [2021] 1 MLJ 549.

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[35] Subsidiary principles of statutory interpretation regarding the limited role of the preamble, side note and headings as aids in the statutory interpretation are laid down by the various decided cases including the following:

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(i) Although preamble can be referred to for interpretation in the event of an ambiguity, one must not create or imagine an ambiguity in order to bring in the aid of the preamble or recital; to do so would frustrate the enactment and defeat the general intention of the Parliament: see House of Lords' decision in *Powell v. Kempton Park Race Course Co* [1899] AC 143, 185; applied in *PP v. Lee Tin Bau* [1984] 1 LNS 56; [1985] 1 MLJ 338, p. 393.B

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(ii) Eusoffe Abdoolcader SCJ's judgment in the Supreme Court case of *Foo Loke Ying & Anor v. Television Broadcasts Ltd & Ors* [1985] 1 CLJ 511; [1985] CLJ (Rep) 122; [1985] 2 MLJ 35 wherein His Lordship held at p. 125 (CLJ); p. 42 (MLJ):

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> A side note or marginal note to a section is part of the statute. It may be considered in construing the section or any other provision of the statute, provided due account is taken of the fact that its function is merely to serve as a brief guide to the content of the section. Collins, MR, in *Bushell v. Hammond* [1904] 2 KB 563 took the approach that the marginal note, while forming no part of the section, was of some assistance as it showed the drift of the section. In *Reg v. Schildkamp* [1971] AC 1, Lord Reid and Lord Upjohn took the view that the marginal or side note will rarely be of any use in interpreting a statute but that they should not be rejected completely as aids, the former putting this (at page 10) on the basis that it is the whole statute that is the product of the legislature and that therefore the whole statute can be looked at if any doubt should arise as to its meaning.

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(iii) Cross-heading and side note may be taken into account in an interpretation of a statutory section but they cannot have equal weight as the words of the Act in the section itself (p. 10D) The heading, cross-headings and the side notes are not meant to control the operation of enacting words (p. 20F). House of Lords in *Reg v. Schildkamp* [1971] AC 1 p. 14G

(iv) The preamble cannot be made use of to control the enactments themselves when the enactments are expressed in clear and unambiguous terms. The preamble is not to influence the meaning otherwise ascribable to the enacting part unless there is compelling reason for it (p. 463). The Parliament may well intend the meaning to extend beyond the immediate mischief; the single intended fact that enacting words are more general than the preamble would suggest is not enough to restrict the meaning of enacting words (462-3) – *A-G v. Prince Ernest Augustus* [1957] AC 636. The same limitation also applies to marginal notes or headings.

[36] As the statutory section is to be interpreted in the context of the statute and also to avoid rendering the words in another section of the same statute superfluous, void or insignificant, the other sections in the statute should be considered together so as to fulfil this principle of harmonious interpretation.

[37] The analysis of the various express provisions carried out in para. [18] above shows that from the context, express provisions and legislative history of GPA 1956, it is reasonably clear that the GPA 1956 still puts the Government in a relatively special or privileged position as compared with a private person and that s. 33(1) of the GPA 1956 does not in any way put the Government in a worse position than a private entity as judgment debtor. The remaining privileges and special position of the Government in civil proceedings are those which are expressly preserved or stipulated in the provisions of the GPA 1956.

[38] On the specific topic of stay of execution and/or suspension of execution of judgment against the Government, there are two express provisions in the GPA 1956 which deal with it. These two express provisions are:

(i) the proviso to s. 33(3) which stipulates: "Provided that *the court by which any such order as aforesaid is made* or any court to which an appeal against the order lies *may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such directions to be inserted therein.*" (emphasis added); and

(ii) the provisions in s. 30 of GPA 1956 which provides as follows:

A *Appeals and stay of execution*

30. Subject to this Act, *all written laws and rules of court relating to appeals and stay of execution shall,* with any necessary modifications, *apply to civil proceedings by or against the Government as they apply to proceedings between subjects.* (emphasis added)

B **[39]** If we were to equate the proviso to s. 33(3) of the GPA 1956 with stay of execution pending appeal, then we would have to delete or render superfluous the words "or otherwise" from the proviso to s. 33(3). This, with due respect, would be contrary to the settled principles of statutory interpretation. If the proviso to s. 33(3) of the GPA 1956 were equated with C stay of execution pending appeal, one wonder why the Legislature use different expressions "suspended" or "directions to be inserted" in the proviso to s. 33(3) instead of either keeping silent (in view of s. 30 on stay pending appeal) or merely cross-referring to s. 30 which expressly uses the words "stay of execution pending appeal" (which has already specifically D provided for stay of execution pending appeal). Coupled with the presence of the words "or otherwise" in the expression "pending an appeal or otherwise", it is reasonably clear that the proviso to s. 33(3) of the GPA 1956 confers power upon the court to direct the suspension of the judgment sum or part of judgment sum against the Government in a situation of pending E appeal as well as in a situation other than a pending appeal.

[40] In the considered opinion of this court, the two decisions of *Global Upline Sdn Bhd v. Kerajaan Malaysia* [2015] 6 CLJ 497 and *Rainbow Bay Sdn Bhd v. MLGH (Sabah) Sdn Bhd* [2020] 1 LNS 2308 which suggest a relatively wider range of circumstances for directing a suspension under the proviso to F s. 33(3) of the GPA 1956 are to be preferred here. This legal position is consistent with the settled principles of statutory interpretation and also in consonance with the legislative history and context of the GPA 1956.

[41] In the premises, this court holds that the proviso to s. 33(3) of the GPA 1956 is not equated to or limited by stay of execution pending appeal G under s. 30 of the GPA 1956.

[42] Hence, this court respectfully agrees with the two decisions of *Global Upline Sdn Bhd v. Kerajaan Malaysia* [2015] 6 CLJ 497 and *Rainbow Bay Sdn Bhd v. MLGH (Sabah) Sdn Bhd* [2020] 1 LNS 2308 that a relatively wider range of circumstances is allowed for directing a suspension under the H proviso to s. 33(3) of the GPA 1956 than in a stay of execution pending appeal.

[43] The effect of the proviso to s. 33(3) of the GPA 1956 read in the context of the Act including s. 30 is that in considering an application for s. 33 certificate, the factors and criteria which the court may take into I account are (i) the factors and circumstances which apply to execution

pending appeal in proceedings between private subjects; and (ii) other factors and circumstances which are peculiar to the Government or which are relevant and applicable to the particular case at hand.

[44] A discretion necessarily involves a latitude of individual choice according to particular circumstances and differs from a case where decision follows *ex debito justitiae* once facets are ascertained: *Evans v. Bartlam* [1937] AC 473, p. 489; *Muholland v. Mitchell* [1971] AC 666 at p. 675 F.

[45] As the proviso to s. 33(3) of the GPA 1956 does not lay down express fetters to the discretion, the other factors and circumstances which are peculiar to the Government or which are relevant and applicable to the particular case at hand are fact sensitive matters to be decided according to the justice of the particular case. In considering whether or not to exercise the discretion and if so, how to exercise it, the court is to strike a balance between justice to the Government and justice to the private judgment-creditor in the circumstances of the case at hand. In doing so, the court can refer to the examples of factors and circumstances considered in the past decided cases but bear in mind that these examples should not be taken to be exhaustive examples or exclusive of other factors and circumstances in future cases.

[46] In *Global Upline Sdn Bhd v. Kerajaan Malaysia* [2015] 6 CLJ 497, the High Court in the judgment of S Nantha Balan J (now JCA) held:

> [37] In this regard, there may be *a range of reasons or circumstances why a judgment debt against the defendant should be suspended.* There could for instance, be *public interest reasons or inter-governmental relationship or Federal/State Government relationships or arrangements that may be impacted* and which would have to be considered.
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> [38] At the other extreme of this range would be *the impecuniosity of the plaintiff and the resultant inability of the defendant to recoup and recover the amounts paid over to the plaintiff in the event the defendant's appeal is successful and restitution is ordered.* But this would be more akin to an argument that will usually be taken in the context of an application for stay of execution ("special circumstances").
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> [39] Needless to say, *the categories are never closed and the list is by no means exhaustive.* However, I have no doubt that whatever that is being advanced as a reason for the suspension, must necessarily have at least two attributes.
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> [40] *First, the reason that is advanced by the defendant should be credible and not specious or contrived. Secondly, it must be on affidavit.* Most certainly it should not be asserted from the Bar. Finally, it *should not be "plucked from the air".*
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> [41] As such, *if there is a credible reason or basis to suspend* the judgment debt then the *court should generally lean in favour of exercising the statutory discretion under the proviso to s. 33(3)* to preclude the judgment creditor from taking any steps as may entitle them to realise the judgment sum.

A [42] I would go so far as to say that *if there is any doubt on the matter and the evidence is resting in the middle,* then the balance should tilt in favour of the defendant or *the benefit of doubt be given to the defendant* and for *the judgment debt to be suspended* accordingly. (emphasis added)

[47] The learned judge's *dictum* in para. [41] of the judgment in *Global*
B *Upline Sdn Bhd v. Kerajaan Malaysia* must be read in the context of the factual matrix of that case, as held by the House of Lords in *Quinn v. Leatham* [1901] AC 495 at p. 506 and in *Harris v. DPP* [1952] 1 All ER at p. 1050D, [1952] AC 694 and the Privy Council in *Mutual Life & Citizens' Assurance Company Ltd & Another v. Clive Raleigh Evatt* [1971] AC 793, at p. 802D-F, [1971]
C 1 All ER 150, [1971] 2 WLR 23. Read in the context of the facts in the case in *Global Upline Sdn Bhd v. Kerajaan Malaysia*, the learned judge was referring to that case wherein the facts relevant to the exercise of discretion to suspend the judgment sum were not proven by the affidavits although the alleged facts (i) were not admitted, (ii) could not be subject of judicial notice, (iii) have
D not been found as facts earlier by the court in the same case, and (iv) have not been established from the facts adduced by affidavits already filed earlier in the same case. It is settled law that where a fact has been admitted by the relevant party, or can be subject of judicial notice, or has established from the facts adduced by affidavits already filed earlier in the same case, or has been found as facts earlier by the court in the same case, such fact need not
E be regurgitated or proved again in a subsequent application in the same case.

[48] In *Rainbow Bay Sdn Bhd v. MLGH (Sabah) Sdn Bhd* [2020] 1 LNS 2308 Leonard David Shim JC (now J) took into consideration the real risk of the State Government being unable to recoup and recover the judgment sum
F from the plaintiff in the event of over-payment or reversal of decision on appeal and the fact that the State Government's funds are public funds to be used in the public interest for public needs before suspending the payment of the judgment sum RM480,583,264.38 except for the sum of RM6,541,638.

Application Of The Principles To The Facts Of The Present Case

G **[49]** Now we turn to the facts and circumstances of our present case at hand.

[50] The relevant parts of the Federal Court's judgments which ordered this assessment of damages are as follows:

H (i) Paragraph 167(a) of the reported judgment in MLJ or para. [144] (i) of the written grounds of judgment issued by the Federal Court in *Pusphaleela R Selvarajah & Anor v. Rajamani Meyappa Chettiar & Other Appeal* [2019] 3 CLJ 441: "We allow the appeal by the third and fourth defendants in the first appeal. In the result, all the orders of the Court
I of Appeal are set aside and we reinstate the orders of the High Court."

(ii) Paragraph 167(b) of the reported judgment in MLJ or para. [144] (ii) (CLJ) of the written grounds of judgment issued by the Federal Court: "We allow the appeal by the first defendant in the second appeal. In the result, all the orders of the Court of Appeal are set aside and we reinstate the order of the High Court. We make the following consequential orders. *The order of the Court of Appeal in respect of the fifth and sixth defendants is varied as follows: (a) para. 2(h)(i) and (ii) are set aside; and (b) the fifth and sixth defendants to pay damages to the plaintiff to be assessed by the High Court judge.* We affirm para. 6 of the order of the Court of Appeal". (emphasis added)

(iii) Paragraph 167(c) of the reported judgment in MLJ or para. [144] (iii) (CLJ) of the written grounds of judgment issued by the Federal Court: "We dismiss the appeal by the seventh defendant. *We affirm the orders of the Court of Appeal. The seventh defendant to pay damages to the plaintiff to be assessed by the High Court Judge.*" (emphasis added)

The sealed orders of the Federal Court in FCCA No. 33 and FCCA No. 34 in the national language are to the same effects as stated above.

[51] The Federal Court's order cross-refers to both the Court of Appeal orders and the High Court order, and must be read together with the Court of Appeal orders and the High Court order.

[52] Insofar as the fifth and sixth defendants are concerned, the Federal Court held *inter alia* that:

> [103] This question highlights some of the problems and difficulty in relation to the computerisation of land titles. In this regard, it will be recalled that despite having the original issue document of title (IDT1) and paying all quit rent, and despite not entering into any sale of the land, the plaintiff found herself dispossessed of the land. The land came to be transferred to the second defendant who then transferred it to the first defendant. The evidence disclosed that the transfers were made by the use a computerised issue document of title.
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> ...
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> [108] It was his submission that the land comprised of one lot, hence there ought to have been only one title to the land as provided in s. 85(2) of the NLC. Unknown to the plaintiff, besides IDT1 which was in her possession, there were however two other titles to the land prepared by the fifth defendant, namely, IDT2 and IDT3. Accordingly, he submitted that since there were several titles issued in respect of the same land, the later titles were invalid and defeasible pursuant s. 340(2) of the NLC. He argued that the original IDT1 must prevail.
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> ...

A [111] In our opinion, as correctly stated by the High Court in the present case, the land title would be void *ab initio*, if and only if, the land registry had, in blatant breach of its duty under the NLC wrongfully registered any land in the register document of title and issued the replacement issue document of title in the name of a third party.

B [112] The key question that arises here then is whether IDT2 was issued in breach of the NLC? It is true that the plaintiff was the original owner of the land and had at all material times in her possession the original issue IDT1. On 24 May 2002, the fifth and sixth defendants generated a computerised replacement title in continuation for the land, under IDT2 as part of the computerisation process. This was a result of the C computerisation process pursuant to para. 8 of the 14th Schedule of the NLC. There is one thing that is very important point to note: IDT2 was generated in the name of 'Rajamani a/p Meyappa Chettiar', that is to say, in the plaintiff's name. As at 12 October 2005 and 16 December 2005, IDT2 was in the name of the plaintiff. It was certified to be a true copy by one "Azlina binti Aziz, Penolong Pegawai Daerah (Daftar) Klang", D who was the officer in charge then. Therefore, IDT2 was correctly prepared in the name of the plaintiff being the "person ... last registered as proprietor in the subsisting register document of title" pursuant to s. 170(2)(a) of the NLC, as found by the High Court. IDT2 was received by the High Court pursuant to s. 383(2) of the NLC. It is equally important to note that the new computerised issue document of title need E not be issued to the registered proprietor so long the old manual issue document of title was not surrendered to the land registry. Pursuant to the provisions in the NLC, the Registrar of Land Titles is required to convert the manual land titles to computerised land titles. The Registrar is empowered to do so on his own initiative even though there is no prior application by the registered proprietor and the Registrar is not obliged to F hand the computerised land title to the registered proprietor until the original manual land title is surrendered to him. At the material time IDT2 was therefore in the computerised land title system. It is true that IDT1 had never been surrendered to the fifth defendant. However, under r. 9(c) of the 14th Schedule of the NLC that the surrender of the title would G only be required if IDT2 was to be given to the plaintiff in exchange. There is no evidence that IDT2 was issued or given to anyone including the plaintiff. *In our opinion, the fifth and sixth defendants have not contravened the NLC in any way in respect of the preparation of IDT2. Having considered with care the lucid and clear reasoning of the High Court, we are in full agreement with the High Court's findings, which the Court of Appeal did not disturb, that there were* H *no breaches of the following provisions of the NLC in the issuance of IDT2:*

(i) There was no breach of ss. 168 and 433 of the NLC because IDT2 was prepared on the Registrar's own initiative pursuant to para. 8(5) of the 14th Schedule of the NLC, instead of the circumstances in s. 166(1)(c) or (d);

I (ii) There was no breach of para. 8(9)(c) of the 14th Schedule of the NLC because the surrender of the existing manual title would only be required if the new computerised title was to be given to the first defendant in exchange; and

(iii) There was no breach of s. 170(2)(c) of the NLC because IDT2 was prepared on the Registrar's own initiative pursuant to para. 8(5) of the 14th Schedule of the NLC, instead of the circumstances in s. 166(1)(c) or (d); IDT2 was correctly issued in the name of the plaintiff; and the lodgement of a private caveat is only endorsed on the register document of title pursuant to s. 324 of the NLC, and not on the issue document of title.

[120] As to the point raised that IDT3 was wrongly issued as the replacement title for IDT2, it bears noting that although there was an application by the fraudster to the fifth defendant for the issuance of a replacement title on 6 January 2006 on the ground that the original title was lost, there is however no evidence that the replacement title as applied was issued and likewise there is no evidence of collection of that title. Nevertheless in the meantime, the fraudster and the second defendant entered into a sale and purchase agreement dated 20 October 2005 and subsequently, there was the presentation for transfer of the land by the fraudster to the second defendant. The signatures purporting to be of the plaintiff on the sale and purchase agreement were forged. The signatures purporting to be of the plaintiff on the transfer form were also forged. The purported transfer of the land from the plaintiff to the second defendant was registered on 12 April 2006, with the production of the original title dispensed with as there was an application by the fraudster for the issuance of a replacement title on the ground that IDT2 was lost, pursuant to s. 299(1)(a) of the NLC. The transfer of IDT2 was by the fraudster who impersonated the plaintiff, and who claimed to previously hold passport no. "X205536", which is the plaintiff's passport. The transfer of the land to the second defendant was pursuant to a crafty scheme analogous to that in *Boonsom Boonyanit v. Adorna Properties Sdn Bhd* [1995] 4 CLJ 45; [1995] 2 AMR 1828 and *Yap Ham Seow v. Fatimawati Ismail & Ors* (*supra*). Pursuant to this transfer, a new computerised title was issued on 16 May 2006 for the land in the name of the second defendant as the registered proprietor, under GM 9890 ("IDT3") pursuant to para. 16 of the 14th Schedule of the NLC. As correctly found by the High Court, IDT3 was a new issue document of title prepared pursuant to para. 16 of the 14th Schedule of the NLC. In this process, the registrar by s. 299(1)(a) of the NLC was empowered to register the transfer by dispensing with the preparation of the original document of title because the original title was lost as claimed and pending replacement at that material time. It bears noting that IDT3 was issued in the name of the second defendant pursuant to transfer rather than pursuant to the application for replacement title as testified by DW8 that, "Tapi sebaik sahaja pindah milik didaftarkan maka dia ialah pemilik berdaftar, jadi ikutkan Infinite Income ialah pemilik berdaftar untuk 9890".

[53] Insofar as the seventh defendant (advocate and solicitor) is concerned, the Federal Court held *inter alia* that:

[133] As seen earlier, *the seventh defendant acted for the second defendant in respect of the initial purchase of the land from the fraudster and the subsequent sale of the same to the first defendant shortly thereafter. The seventh defendant also introduced the fraudster to the third and fourth defendants, and requested them to*

act for the fraudster in the first transaction. The seventh defendant and the law firm in which he was attached to, acted for the second defendant (and through it for the fraudster) to apply for and obtain replacement title to the land.

[134] The plaintiff's pleaded case against the seventh defendant is captured in para. 21(a) of the re-amended statement of claim which reads, "the plaintiff pleads that the seventh defendant acted falsely and fraudulently in acting in concert with the third and fourth defendants by causing the fraudulent execution of the sale and purchase agreement dated 20 October 2005 and the memorandum of transfer dated 25 October 2005, knowing full well that it would cause the plaintiff to lose the said land".

[135] It will be recalled that *the High Court found that the seventh defendant had actual knowledge of the fraud committed by the second defendant.* This is essentially a finding of fact. Accordingly, the High Court expressly found that the seventh defendant was privy to the fraud beyond reasonable doubt, which was the applicable standard of proof for fraud in civil cases at the material time. Nevertheless, the High Court proceeded to dismiss the plaintiff's claim against the seventh defendant on the basis that the court was of the view that the pleaded case against the seventh defendant was one of conspiracy with the third and fourth defendants to defraud, and the court was not satisfied that there existed such a conspiracy or collusion.

[136] As indicated earlier, an appeal was filed by the plaintiff to the Court of Appeal against the decision of the High Court dismissing her claim against the seventh defendant. A cross-appeal was filed by the seventh defendant in respect of the specific findings of fraud made against him by the High Court. The Court of Appeal allowed the plaintiff's appeal and dismissed the seventh defendant's cross appeal. *The Court of Appeal was of the view that the plaintiff's pleaded case against the seventh defendant was premised on fraud, as opposed to the tort of conspiracy to defraud. The Court of Appeal accepted as correct the High Court's finding of fraud against the seventh defendant. The plea that the seventh defendant acted in concert with the third and fourth defendants was in relation to the fraudulent execution of the sale and purchase agreement and the memorandum of transfer which resulted in the plaintiff's loss of the land.* In its judgment, the Court of Appeal explained that in the present case 'acting in concert' is not a plea in conspiracy:

> [114] With due respect to the learned JC, this is erroneous because the plaintiff's pleaded case against the 7th defendant was not founded on conspiracy. It was founded on privy to fraud, which the learned JC himself found to have been proved against the 7th defendant. There was no plea of conspiracy to defraud in the Amended Statement of Claim.
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> [115] The plaintiff's averment that the 7th defendant had acted in concert with the 3rd and 4th defendants to cause fraudulent transfer of the land must be seen in the context of their act of obtaining the signatures of the bogus Rajamani on the Agreement

and Memorandum of Transfer. That was proved as the 7th defendant had acted in concert with the 3rd and 4th defendants to achieve the attestation and witnessing of the signatures.

[116] Having regard to the totality of the evidence and the surrounding circumstances of the case, the 7th defendant's defence that he had no knowledge of the fraud because he was a junior and inexperienced litigation lawyer cannot hold water. In the first place, being an inexperienced junior lawyer is no excuse for being negligent unless it can be shown that he could not have known of the fraud with due diligence.

[117] But most important of all, *the learned JC had found the 7th defendant to be privy to the fraud committed by the 2nd defendant. This finding is fatal to his defence as it demolished the whole substratum of his defence of lack of knowledge and experience.*

[137] Insofar as the seventh defendant's cross-appeal was concerned, it was dismissed on the basis that the Court of Appeal saw no reason to interfere in respect of findings of fact by the High Court, which findings also involved the credibility of the seventh defendant as a witness.

[138] At the hearing before us, learned counsel for the seventh defendant argued that 'acting in concert' is a plea in conspiracy. According to learned counsel, case laws have often regarded 'acting in concert' synonymous with 'conspiracy'. We were referred to certain authorities but in our opinion they did not assist us. He submitted that the plaintiff's ingredients of the allegation of fraud against the seventh defendant in that the seventh defendant acted in concert with the third and fourth defendants, by causing the fraudulent execution of the sale and purchase agreement and the memorandum of transfer, knowing full well that it would cause the plaintiff to lose the land, was a plea in 'conspiracy to defraud'. It was submitted that the plaintiff withdrew the allegation of fraud against the third and fourth defendants. With the allegation of fraud against the third and fourth defendants being withdrawn, the charge of conspiracy to defraud against the seventh defendant for fraudulently acting in concert with the third and fourth defendants, by causing the fraudulent execution of the sale and purchase agreement and the memorandum of transfer knowing full well that it would cause the plaintiff to lose the land would automatically fall. He added that the plaintiff did not allege that the seventh defendant acted fraudulently, independently or with any other person. Neither did the plaintiff allege that the seventh defendant was the mastermind behind the fraud with the concerted aid of others.

[139] We agree with learned counsel for the plaintiff that question 3 is for all intents and purposes turns on a question of interpretation of the plaintiff's pleaded case against the seventh defendant, namely whether the pleaded case was one premised on fraud or conspiracy to defraud.

[140] *In our opinion, a close reading of para. 21(a) of the reamended statement of claim, as well as the manner in which the case was pursued at trial against the seventh defendant, makes it clear that the plaintiff's case against the seventh defendant*

was for fraud. A plain reading of the relevant pleading would show that the case against the seventh defendant was that he acted falsely and fraudulently; in acting in concert with the third and fourth defendants caused the fraudulent execution of the relevant sale and purchase agreement and memorandum of transfer; and with the knowledge that it would cause the plaintiff to lose the land. In fact, the Bahasa Malaysia version of para. 21(a) which states "plaintif memplidkan bahawa defendan ke-7 telah bertindak secara salah dan frod apabila bertindak bersama-sama defendan ke-3 dan ke-4 dengan mengakibatkan perlaksanaan perjanjian jualbeli bertarikh 20 Oktober 2005 dan Memorandum Pindahmilik bertarikh 25 Oktober 2005, dengan pengetahuan penuh bahawa ia akan mengakibatkan plaintif menghilangkan hartanahnya", clearly indicate that the plaintiff's pleaded case against the seventh defendant was premised on fraud. It is not correct, as submitted by learned counsel for the seventh defendant, that a cause of action for fraud was not expressly pleaded.

[141] *From the evidence, it emerged that the seventh defendant had been involved in everything from dealing with the fraudster, to linking her up with the third and fourth defendants, to dealing with her replacement title, and facilitating the sale of the land from the fraudster to the second defendant and shortly thereafter for a second time from the second defendant to the first defendant at a marked up price. In the words of the High Court:*

> *78. Consequently in the circumstances, I find and hold that the Seventh Defendant was privy to the scheme of the Second Defendant in cahoots with the bogus Plaintiff. I reiterate that the Seventh Defendant had actual over and above constructive knowledge of the aforesaid scheme here. However he had chosen to appear oblivious in his self-interest to serve his client regardless of the consequences. Though he might not have actually participated in the fraudulent scheme of the Second Defendant, I am nonetheless satisfied beyond reasonable doubt that he was privy to it.*

[142] It is axiomatic that as an appellate court, we will not readily interfere with findings of fact arrived at by the court of first instance unless that court is shown to be plainly wrong in arriving at its decision (see *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453). It has not been successfully shown to us that the findings were plainly wrong or perverse in any way. In this context, we agree with the Court of Appeal that there was a specific plea of fraud against the seventh defendant, and that the plea of acting in concert was only with regards to the fraudulent execution of the sale and purchase agreement and the memorandum of transfer. There was no explicit plea of conspiracy to defraud. *On the evidence before us, we are of the opinion that the plaintiff's pleaded case for fraud has been satisfactorily proved on the higher standard then applicable, as found by the High Court. The High Court however erred in taking a technical and restrictive approach and reading a "tort of conspiracy" into plain pleadings for fraud.*

(emphasis added)

[54] In the Court of Appeal Civil Appeal No. B-01(W)-71-03-2015 ('COA Appeal No. 71') filed by the plaintiff/Rajamani against all the seven defendants, the Court of Appeal held as follows:

1. "The Plaintiff's appeal is allowed and the High Court's judgment dated 29.01.2015 and order dated 13.02.2015 is set aside;

2. The Plaintiff's claims are allowed as follows:

   (a) Declaration that the Plaintiff is the registered proprietor and true and lawful owner of the Subject Land;

   (b) Declaration that the purported transfer of the Subject Land to the 2nd Defendant (Infinite Income Sdn Bhd) was void *ab initio*;

   (c) Declaration that the purported transfer of the Subject Land to the 1st Defendant (Eng Beng Development Sdn Bhd) was void *ab initio*;

   (d) Declaration that the purported transfer of the Subject Land from the Plaintiff to the 2nd Defendant and eventually to the 1st Defendant was procured by fraud and/or forgery and/or through a void or insufficient instrument;

   (e) Declaration that the 2nd Defendant (Infinite Income) was not a *bona fide* purchaser for value in respect of the Subject Land;

   (f) Declaration that the duplicate Issue Document of Title was null and/or void *ab initio*;

   (g) An order setting aside the purported title or interest of the 1st Defendant and the 2nd Defendant in respect of the Subject Land;

   (h) An order directing the 5th and/or 6th Defendants to:

      (i) cancel the entries and memorials in the register of titles which were in favour of the 1st and 2nd Defendants;

      (ii) reinstate the name of the Plaintiff as the registered proprietor or owner of the Subject Land

   (i) Damages against all Defendants to be assessed by the High Court;

   (j) Interest.

3. The 1st Defendant (Eng Beng) shall pay the Plaintiff costs of appeal and trial to the Plaintiff in the sum of RM100,000.00;

4. The 2nd Defendant (Infinite Income) shall pay the Plaintiff costs of appeal and trial to the Plaintiff in the sum of RM100,000.00;

5. The 3rd Defendant (Pushpaleela) and the 4th Defendant (Messrs MY Choong, Pushpa & Co) shall pay the Plaintiff costs of appeal and trial to the Plaintiff in the sum of RM120,000.00;

6. The 5th Defendant (Land Administrator) and the 6th Defendant (Registrar of Titles) shall pay the Plaintiff costs of appeal and trial to the Plaintiff in the sum of RM50,000.00;

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7. The 7th Defendant (Sheelan Arjunan) shall pay the Plaintiff costs of appeal and trial to the Plaintiff in the sum of RM120,000.00;

8. Deposit for the appeal shall be refunded to the Plaintiff.

(see exh. "MCR-3" to the plaintiff's affidavit-in-support affirmed on 28 September 2022 supporting the s. 33 application).

B

[55] At the full trial the High Court made the following orders in its decision, as summarised in the following paras. [65] to [68] of the Federal Court's grounds of judgment:

Decision of the High Court

C

[65] As regards the claim against the third and fourth defendants, the High Court dismissed the plaintiff's claim. The High Court in a comprehensive and well-reasoned judgment held that the third and fourth defendants, who acted for the fraudster, did not owe a duty of care to the plaintiff, relying on the Court of Appeal decision in *Yap Ham Seow v. Fatimawati bt Ismail & Ors and another appeal* [2014] 1 MLJ 645, which the

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High Court found itself to be bound by it. The High Court observed that the third and fourth defendants were in fact potentially negligent in failing to further investigate into the identity of the fraudster. However, in the absence of a duty of care (as found by the High Court), the plaintiff's claim in negligence against them failed.

E

[66] In respect of the claim against the first defendant, the High Court dismissed the plaintiff's claim. In this regard, the High Court found that duplicate title produced by the fifth defendant and used for the transfer of the land to the second defendant was not invalid or in other words void *ab initio* and hence, this and the subsequent transfer of the land to

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the first defendant were not nullities; the subsequent transfer of the land to the first defendant and the registration thereof in the name of the first defendant was indefeasible by reason that the first defendant was the subsequent *bona fide* purchaser for valuable consideration. The High Court added that as the first defendant's title is valid and indefeasible, it follows therefore that the private caveat was wrongfully and unlawfully entered

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by the plaintiff and although the same has lapsed, the registrar's caveat which still subsists, ought to be removed since the rights of the parties have been determined. In the circumstances in damage pursuant to section 329 of the NLC and the plaintiff is prohibited from lodging further caveats on the land.

H

[67] Insofar as the claim against the seventh defendant is concerned, the High Court found that the seventh defendant had actual knowledge of the fraud committed by the second defendant. Consequently, the High Court expressly found that the seventh defendant was privy to the fraud beyond reasonable doubt. That was the applicable standard of proof for fraud in civil cases at the material time. However, the High Court

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proceeded to dismiss the plaintiff's claim against the seventh defendant, *albeit* with reluctance, on the basis that the Court was of the view that the pleaded case against the seventh defendant was one of conspiracy with

the third and fourth defendants to defraud, and the Court was not satisfied that there existed such a conspiracy or collusion. Hence, purely on a technical reading of the pleaded case against the seventh defendant that it was a plea in the tort of conspiracy, the plaintiff's claim was dismissed by the High Court.

[68] It bears noting that the second defendant was absent both at the trial in the High Court and at the hearing in the Court of Appeal and its counsel had also failed to turn up at this appeal. Nor did it file any appeal or cross appeal against the decision of the High Court.

The sealed order of the Federal Court in the second appeal reproduced the following items of the High Court order:

6. perenggan-perenggan 1 sehingga 6 Penghakiman Mahkamah Tinggi bertarikh 29.1.2015 dalam Guaman No. MT2-21-136-2007 adalah dihidupkan semula seperti berikut;

    1. Kesemua tuntutan-tuntutan Plaintif terhadap Defendan Pertama adalah ditolak;

    2. Kaveat persendirian yang dimasukkan oleh Plaintif pada 28.3.2007 melalui No. Perserahan 952/2007 ("Kaveat Persendirian tersebut") untuk tanah yang dipegang di bawah Geran Mukim 9890, Lot 4965, Mukim Kapar, 5th Mile Sungei Binjai Road, Daeah Klang, Selangor Darul Ehsan ("Tanah Tersebut") adalah dimasukkan dengan salah;

    3. Plaintif hendaklah membayar kepada Defendan Pertama gantirugi (untuk memasukkan dengan salah Kaveat Persendirian tersebut) untuk ditaksir oleh Pendaftar bersama dengan faedah pada kadar 5% setahun ke atasnya daripada tarikh gantirugi ditaksir sehingga tarikh penyelesaian penuh;

    4. Plaintif dengan diri sendirinya, pekerja-pekerjanya, agen-agennya dan/atau pembantu-pembantunya atau yang lain dihalang dan satu injunksi diberikan untuk menghalang Plaintif daripada memasukkan sebarang kaveat yang selanjutnya ke atas Tanah tersebut berdasarkan tuntutan yang serupa seperti apa yang digunakan sebagai asas Kaveat Persendirian tersebut;

    5. Kaveat pendaftar yang dimasukkan pada 3.7.2007 ("Kaveat Pendaftar tersebut") ke atas Tanah tersebut dibatalkan; dan

    6. Defendan Kelima hendaklah membatalkan Kaveat Pendaftar tersebut dan membatalkan kemasukannya pada dokumen pendaftaran hakmilik Tanah tersebut dan mencatatkan di sana alasan pembatalan tesebut serta tarikh pembatalan.

7. Perenggan 1 Penghakiman Mahkamah Tinggi bertarikh 13.2.2015 dalam Guaman No. MT2-21-136-2007 adalah dihidupkan semula.

[56] As the law does not allow double recovery and the assessment of damages relate to the same set of damages suffered by the plaintiff/Rajamani as a result of torts or civil wrongs committed by two or more co-defendants

in the same series of events in connection with the same parcel of land, this court carried out the assessment of damages under the two judgments and orders of the Federal Court in the same assessment proceedings.

[57] In conclusion, this court on 29 July 2021 assessed the damages and decided that the damages suffered by the plaintiff in the present case were as follows:

(i) loss of title to the land: RM10,319,850; and

(ii) legal fees and costs over and above the party-to-party costs: RM85,000.

[58] After hearing counsel's submissions on quantum of costs, this court assessed the costs of assessment proceeding at RM30,000, subject to allocator, to be payable by the fifth, sixth and seventh defendants to the plaintiff.

[59] It is also recorded in the decision on assessment of damages (as stated in paras. [40] to [42] of the grounds of judgment: see [2021] 1 LNS 2233; [2021] MLJU 2648) as follows:

> **Miscellaneous**
>
> [40] After the pronouncement of the decision in this assessment of damages on 29.7.2021, this Court also posed the questions to the parties' respective counsel as to whether it is within the ambit of this assessment proceeding for this Court address the questions (a) whether the 5th, 6th and 7th Defendants are jointly, severally or joint and severally liable for the damages assessed; and (b) what should be the apportionment of the degree or percentage of responsibility of each of 5th, 6th and 7th Defendants for the amount of damages assessed by this Court.
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> [41] In response, all of the counsel namely counsel for the Plaintiff, counsel for the 5th and 6th Defendants and counsel for the 7th Defendant unanimously answered in the negative to both the miscellaneous questions posed by this Court.
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> [42] In the premises, the assessment proceeding and decision ended on 29.7.2021 without any submission on or dealing with the two miscellaneous questions.

[60] With the rider stated in the immediately foregoing paragraph, this court expected that one of the relevant parties would refer the two miscellaneous questions to the Federal Court for clarification and/or ancillary orders.

[61] On 7 December 2021, in connection with the seventh defendant's application for stay of execution pending appeal, this court made a conditional order of stay in the following terms:

(1) Execution of the Judgment Assessing Damages dated 29.7.2021 is stayed on the condition that *half of the Judgment Sum* of RM10,414,850.00 and half of the interest at RM1,425.30 per day from 29.01.2019 until 29.01.2022 *shall be deposited by the 7th Defendant*

into an interest bearing bank account in the joint names of the Plaintiff's solicitors and the 7th Defendant's solicitors on or before 29.01.2022, failing which the 7th Defendant's Stay Application is dismissed; and

(2) The amounts deposited pursuant to item (1) above, together with interest earned thereon, shall be released to the successful party in the appeal before the Court of Appeal (namely, Court of Appeal Civil Appeal No. B-01(W)-486-08-2021) and in the Federal Court Review Motion in respect of Federal Court Civil Appeal No. 01(f)-34-10-2016(B), or as directed by the Federal Court in the said review motion and/or by the Court of Appeal in the said appeal.

(emphasis added)

[62] There is no evidence before this court to show (i) whether or not the seventh defendant has deposited half of the judgment sum into the joint stakeholders' account; (ii) whether or not the plaintiff has recovered any money from the seventh defendant; (iii) whether or not the plaintiff has taken steps to recover money from the seventh defendant; and/or (iv) what is the outcome of the appeal before the Court of Appeal (namely, Court of Appeal Civil Appeal No. B-01(W)-486-08-2021) and in the Federal Court review motion in respect of Federal Court Civil Appeal No. 01(f)-34-10-2016(B).

[63] Implicit in this court's order dated 7 December 2021 (in connection with the seventh defendant's application for stay of execution pending appeal) and implicit in paras. [40] to [42] of this court's grounds of judgment on the assessment of damages was that pending the appeal by the seventh defendant (advocate and solicitor) and pending the Federal Court's clarification as to the extent and apportionment of liability between the fifth and sixth defendants (Government officers) and the seventh defendant (advocate and solicitor), the seventh defendant (advocate and solicitor) was to pay half of the judgment sum, while leaving the other half of the judgment sum to be paid by the fifth and sixth defendants (Government officers).

[64] In the plaintiff's outline submission dated 21 November 2022 the plaintiff has confirmed and admitted that on 3 October 2022 the fifth and sixth defendants paid an amount of RM6,996,566.67 to the plaintiff towards the payment of the judgment sum awarded by this court. This fact of payment of the said amount is also confirmed in the plaintiff's supplementary affidavit in para. 5 and exh. "MCR4" filed in the s. 33 application.

[65] On the one hand, this court is satisfied that if the Federal Court as the apex were to answer the two questions posed by this court in para. [40] of this court's grounds of judgment dated 21 September 2021 in the worst scenario adverse to the fifth and sixth defendants, the fifth and sixth defendants through the State Government would certainly be in a position to pay up whatever balance amount of the judgment sum which the apex court held and clarified as liable to be paid by the fifth and sixth defendants to the plaintiff.

[66] On the other hand, this court is not satisfied that if the Federal Court as the apex were to answer the two questions posed by this court in para. [40] of this court's grounds of judgment dated 21 September 2021 in a way or extent which is not in the worst scenario adverse to the fifth and sixth defendants, any money representing the balance judgment sum which the State Government pays on behalf of the fifth and sixth defendants to the plaintiff would be readily recoverable as excess payment by the fifth and sixth defendants from the plaintiff. In fact, the plaintiff has not adduced any evidence to persuade this court that she would not spend, utilise or dissipate the money in the balance judgment sum, if paid, pending the apex court's decision or clarification on the two questions posed by this court in para. [40] of this court's grounds of judgment dated 21 September 2021.

[67] In the present case, the plaintiff has not produced any cogent evidence that she is in urgent need of the use of the balance judgment sum over and above the RM6,996,566.67 she has already received from the fifth and sixth defendants. The plaintiff has also not produced any cogent evidence that she would suffer undue hardship or grave injustice if the balance judgment sum is kept in abeyance until further decision or clarification of the Federal Court on the two questions posed by this court in para. [40] of this court's grounds of judgment dated 21 September 2021.

[68] Moreover, it is in evidence that the plaintiff here is a foreign national but she has not produced any evidence that she has substantial assets or property within Malaysia which the State Government can have ready recourse to in the event of any over-payment by the State Government on behalf of the fifth and sixth defendants.

[69] In the circumstances, the State Government on behalf of the fifth and sixth defendants have already paid about two-thirds of the total judgment sum, an amount which is more than what this court envisaged in the order dated 7 December 2021.

[70] The reasons for this court having envisaged that if the Federal Court were to apportion the responsibility and/or liability as between the fifth and sixth defendant on the one part and the seventh defendant on the other part, the fifth and sixth defendants' portion of liability and responsibility is unlikely to exceed half (50%) are as follows:

(i) the High Court, the Court of Appeal and the Federal Court held that the seventh defendant (advocate and solicitor) actively participated in the fraud of the second defendant and the scheme of the fraudster: see paras. [133] to [141] of the Federal Court's grounds of judgment;

(ii) the Federal Court held that the fifth and sixth defendants were not in breach of the relevant provisions of the National Land Code: see para. [112] of the Federal Court's grounds of judgment;

(iii) although the Federal Court in para. [143] of its grounds of judgment ordered the fifth and sixth defendants to pay damages to the plaintiff to be assessed by the High Court, the grounds of judgment in the Federal Court did not expressly or specifically explain the basis and reasons for such holding;

(iv) the grounds of judgment of the Court of Appeal has not been produced by any party to this court for understanding the basis and reasons for holding the fifth and sixth defendants liable to pay damages to the plaintiff;

(v) even if one were to proceed on the proposition that the fifth and sixth defendants were held liable for negligence, the seventh defendant's active participation in the fraud of the fraudster would logically carry a comparatively heavier responsibility and more percentage liability than that of the fifth and sixth defendants' negligence (if that be the case); and

(vi) the comparatively higher percentage of liability envisaged against the seventh defendant (advocate and solicitor) is also reinforced or corroborated by the Court of Appeal's orders as to costs (which were confirmed by the Federal Court) that the seventh defendant shall pay costs of RM120,000 to the plaintiff, while the fifth and sixth defendants were ordered to pay the plaintiff RM50,000 as costs.

[71] In addition, this court also takes into consideration that the funds of the State Government which are used to pay the judgment sum to the plaintiff are public funds which are to be used for public interest or public purposes. It does not serve the public interest for the public funds to be ordered to be paid out for the balance judgment sum in the peculiar circumstances of our present case until the Federal Court has clarified and/or made ancillary orders on the two miscellaneous questions raised in this court's grounds of judgments on the assessment of damages.

[72] In the entire circumstances of the present case, this court held that the discretion of the court ought not be exercised to issue a s. 33 certificate in favour of the plaintiff against the fifth and sixth defendants (public officers) after the State Government has already paid the plaintiff about two-thirds of the total damages assessed and awarded by this court.

[73] Further or alternatively, if this court were to consider and decide on an application for s. 33 certificate before the State Government has paid any amount on behalf of the fifth and sixth defendants towards the satisfaction of the judgment sum, this court would in that event have inserted in the s. 33 certificate a direction that half of the total judgment sum shall be suspended pending the Federal Court's clarification and/or ancillary order as to the two miscellaneous questions, namely, (i) whether the fifth, sixth and seventh

defendants are jointly, severally or joint and severally liable for the damages assessed; and (ii) what should be the apportionment of the degree or percentage of responsibility of each of fifth, sixth and seventh defendants for the amount of damages assessed by this court. In this regard, the court in the case of *Tang Hak Ju v. Ketua Menteri Negeri Pulau Pinang & Ors* [2010] 1 CLJ 993 suspended payment of half of the judgment sum pending appeal in that case.

Conclusion

[74] In conclusion, this court on 8 December 2022 dismissed the plaintiff's application for s. 33 certificate with liberty to file afresh, if expedient, after the Federal Court's clarification and/or decision on the two miscellaneous questions:

(i) whether the fifth, sixth and seventh defendants are jointly, severally or joint and severally liable for the damages assessed; and

(ii) what should be the apportionment of the degree or percentage of responsibility of each of fifth, sixth and seventh defendants for the amount of damages assessed by this court.

[75] As this application involves a novel question of law of public importance which has not been specifically decided by the Federal Court or the Court of Appeal in the past, this court ordered that each party shall bear the costs of this application.